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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 737

RALPH L. WRIGHT,

Petitioner,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

The Writ should not be allowed, because the "Questions Presented," "Statement of Case," "How Federal Question Is Presented," and the "Reasons for Granting the Writ," as set out in Petitioner's Brief are incomplete and inaccurate and furnish no ground for allowance of certiorari. In particular, not disclosed therein is the fact that the judgment of the Court of Appeals of Ohio, sought to be reviewed, remanded the cause to the Court of Common Pleas of Hamilton County, Ohio for a new trial, *and is therefore a non-final judgment.* Further, the decision of the Supreme Court of Ohio denying Petitioner's motion to certify was general, without any specification of ground on which the decision rested, and since the record con-

tained both federal and non-federal questions, it presumably was based on tenable non-federal grounds, and, hence, will not be reviewed by this Court.

In the event, however, this Court concurs in Petitioner's position, Respondent should be permitted to present to the Supreme Court of Ohio the non-federal assignments of error urged by it in the Court of Appeals, but not considered or passed on by the Supreme Court of Ohio because of the requirements of Ohio Statutes and Rules of Practice of the Supreme Court of Ohio.

QUESTIONS

I.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, the Plaintiff fails to adduce probative facts to show a causal relationship between the violation and the injury, and, therefore, reasonable minds could not reasonably differ on the question of proximate causation, it is error for the Trial Court to charge the jury on the applicability of the Federal Safety Appliance Act.

II.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, it is proven that the railroad violated the Federal Safety Appliance Act, it is not then *automatically* required that the question of proximate causation be submitted to the jury.

III.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, the Plaintiff fails to

adduce probative facts to show a causal relationship between the violation of the Federal Safety Appliance Act and the injury, and therefore, reasonable minds could not reasonably differ on the question of proximate causation, and where the trial judge nevertheless charges the jury on the applicability of the Federal Safety Appliance Act, the Court of Appeals of the State of Ohio has the *duty* to correct this error by reversing and remanding for a new trial.

IV.

This Court will not grant certiorari where the Ohio Court of Appeals reverses the decision of the Trial Court and remands for new trial, since the decision of the Ohio Court of Appeals sought to be reviewed is a non-final judgment.

V.

Where, the Supreme Court of Ohio overrules a Motion to Certify without specifying the ground(s) for its decision, this Court will not grant certiorari because it must be presumed that the Supreme Court of Ohio based its decision on tenable nonfederal ground(s) present in the record.

STATEMENT

Petitioner's "Statement of the Case" fails to set forth vital facts, which facts demonstrate that the instant case is *not* one calling for allowance of a Writ. For the sake of brevity, we shall supplement Petitioner's "Statement of the Case," rather than re-state that which appears therein.

Respondent's train was travelling northwardly through Kentucky. A knuckle broke, causing a parting of the train about 40 cars back from the engine (R. 12). Petitioner,

a fireman, alighted from his position in the diesel engine, went forward along the track and flagged a southbound freight train on the adjoining tracks and climbed into the cab of the southbound train (R. 41). While there, the conductor of Respondent's train radioed to the engine of the southbound train and told the engineer that he had knuckle trouble about 40 car lengths from his own engine, and asked the southbound man to move his train forward and drop off a replacement knuckle where Respondent's train was parted (R. 52).

Petitioner rode the southbound train back to his own engine, jumped off, and climbed back into his own diesel engine and *sat talking with his engineer for 7 or 8 minutes.* The conductor then radioed them that the knuckle thrown off by the southbound train would not fit, and instructed Petitioner to get a knuckle out of the nose compartment of his diesel engine, throw it off on the side of the track and light a fusee by it (R. 53).

It was this extended lapse of time between the alleged violation of the Federal Safety Appliance Act and the Petitioner's entering the nose compartment of the engine to secure a replacement knuckle, which formed the basis of the Opinion of the Ohio Court of Appeals, First Appellate District (Pet. App. A, p. 5a) in reversing and remanding:

> "In the case at bar, the evidence is clear that after the failure of the coupler, the plaintiff alighted from his train, flagged a southbound train, mounted the cab of the diesel of the latter train; dismounded therefrom; mounted his train again, and sat talking for seven or eight minutes with his engineer. In the language of one of the cases, he had 'arrived at a place of safety' in the chain of sequence, resulting from the breaking of the coupler. It was then that he entered the nose of the diesel on his train; a new chain of events was in the making; it was the result of the condition of, and situation in this latter compartment,

combined with his act of throwing out the knuckle, that was the efficient cause of his injuries. . . . *Brady* v. *Southern R. R. Co.*, 320 U. S. 476; . . . *New York, New Haven & Hartford R.R. Co.* v. *Leary*, 204 Fed. (2d) 461."

After the Trial Court (Court of Common Pleas of Hamilton County, Ohio) had entered judgment on the verdict for Plaintiff (Petitioner herein), the Defendant (Respondent) appealed to the Ohio Court of Appeals, First Appellate District, alleging six Assignments of Error, viz:

1. The Court erred in admitting certain evidence objected to by Defendant-Appellant;

2. The Court erred in construing Ohio Revised Code §2317.52 in permitting a witness to be called under the said Statute and cross-examined as agent in charge of Defendant-Appellant.

3. The Court erred in granting Special Charge No. 1 and in its general charge to the jury re the applicability of the Federal Safety Appliance Act.

4. The Court erred in its charge to the jury in answer to the jury's inquiry as to the affect of income tax on a verdict.

5. The verdict is excessive, appearing to have been given under the influence of passion and prejudice.

6. The verdict is not sustained by sufficient evidence, is against the manifest weight of the evidence, and is contrary to law.

Only Assignment of Error No. 3 involved a Federal question; the other five Assignments being questions of purely State law and procedure. Each of these Assignments of Error was argued by Counsel for the parties in written briefs filed in the Court of Appeals, as well as in oral argument.

The Court of Appeals, basing its decision solely on Assignment of Error No. 3, held (Pet. App. A, p. 7a):

> "... we find that the giving of Special Charge No. 1 requested by the plaintiff, and the Court's general charge with reference to the applicability of the Federal Safety Appliance Act, constitutes reversible error.
>
> "We find no other errors apparent upon the record.
>
> "The judgment of the Court of Common Pleas is reversed and the cause is remanded to that court for a new trial and further proceedings according to law."

It must be remembered that Plaintiff (Petitioner) in his Amended Petition actually sought recovery on but two theories:

(1) that the Defendant (Respondent) violated the Federal Safety Appliance Act and as a "direct and proximate" result thereof the Plaintiff was injured;

(2) that the Defendant failed to provide Plaintiff with a safe place to work and as a "direct and proximate" result thereof the Plaintiff was injured.

Both of these issues were submitted by the Trial Court to the jury. The Court of Appeals reversed, finding that there was insufficient evidence of a proximate relationship between the violation of the Federal Safety Appliance Act and the injury of the Plaintiff, *remanding the cause for a new trial wherein the Plaintiff would still have the opportunity to recover on the basis of the alleged "unsafe place to work."*

From the judgment of the Court of Appeals, Plaintiff (Petitioner) filed a Motion to Certify in the Ohio Supreme Court. Whereupon, the entire record in the case (including Defendant's six Assignments of Error in the Court of Appeals and Briefs of both parties in the Court of Appeals) was before the Supreme Court of Ohio for review in passing on the propriety of the Plaintiff's Motion to Certify. The Ohio Supreme Court overruled said Motion, stating:

"It is ordered by the Court that this motion be, and the same hereby is, overruled" (Pet. App. C, p. 10a).

The Ohio Supreme Court's entry overruling the Motion to Certify does not reflect the ground on which the Motion was overruled. It must be presumed then, that the overruling was based on the conclusion that no error had intervened by reason of the judgment of the Court of Appeals to reverse and remand and that the case was not one "of public or great general interest" under Ohio Constitution, Article V, Section 2. Since five of the six Assignments of Error filed by Defendant (Respondent) in the Court of Appeals were unquestionably based on non-federal grounds, and any one of these could have been the basis of the Ohio Supreme Court's decision to overrule the Motion to Certify (hence refusing to alter the decision of the Court of Appeals remanding the cause to the Trial Court for a new trial), it must, therefore, be presumed that the decision overruling the Motion to Certify rested on non-federal ground(s), and is not reviewable by this Court.

Should this Court determine, however, that the Supreme Court of Ohio's decision overruling the Motion to Certify amounted, in effect, to an affirmance of the Court of Appeal's decision by reinstating the judgment of said Court, and that the overruling of the Motion *was necessarily based solely* on the federal question (which we do not believe to be true), it is obvious that the effect of such holding would be to *deprive Respondent of the possible benefit of the five non-federal issues.*

This is true, because in Ohio, an Appellee (Respondent in the Supreme Court of Ohio) is permitted to file its Assignments of Error in the Supreme Court of Ohio without filing a cross appeal. In support of its Motion to Certify, Petitioner alleged three Assignments of Error (i.e. essentially that the Court of Appeals misconstrued the

Federal Safety Appliance Act and the Federal Employers' Liability Act).

The Supreme Court of Ohio overruled this Motion. As a result, Respondent did not have the opportunity to file a brief on the merits. The Rules of Practice of the Supreme Court of Ohio provide that an Appellee may *include in its brief ON THE MERITS its assignment of errors*, and may argue same with supporting authorities in the brief on the merits. Rule II Section 2(B) of the Rules of Practice provide:

> "... appellee may include in his brief his assignments of error, if any, as provided in Section 2505.22 of the Revised Code."

Ohio Revised Code § *2505.22* provides in part:

> "Assignments of error may be filed on behalf of an appellee *which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part.*" (Emphasis added.)

Since the Supreme Court of Ohio overruled Petitioner's (Appellant there) Motion to Certify, Respondent (Appellee) never was presented with the opportunity to file its Assignments of Error (see Rule II Section 2(B), *supra*) and since that Court did not "reverse in whole or in part" the judgment of the Court of Appeals (See *R. C.* § *2505.2*- *supra*) the Supreme Court of Ohio could not have passed on any Assignments of Error of Respondent, even if we (prematurely) had filed Assignments of Error.

Out of caution, and recognizing that this Court *may* grant the Writ and accept Petitioner's argument on the merits, we submit that this Court should in such case permit Respondent to "have its day in court" before the Ohio Supreme Court on the five non-federal, local questions of

law present in the case, but not yet, because of Ohio's rule, presented or decided by the Supreme Court of Ohio.

We believe, however, that this question will be unnecessary to decide, inasmuch as there are three dispositive reasons why the Writ should not and will not be allowed:

1. The decisions of the Court of Appeals of Ohio and the Supreme Court of Ohio are not in violation of the decisions of this Court. The evidence clearly showed that the violation of the Federal Safety Appliance Act played *no part* in the injury of the Plainitff.

2. The judgment of the Court of Appeals remanded this cause to the Trial Court for a new trial. This Court will not grant Certiorari where the judgment sought to be reviewed is a *non-final judgment*.

3. The Ohio Supreme Court, in overruling Plaintiff's (Petitioner's) Motion to Certify, did not state the ground on which it reached its decision. The record contained both federal and non-federal questions. It must, therefore, be presumed that the overruling of the Motion rested on non-federal ground(s) and hence will not be reviewed by this Court.

ARGUMENT

I. The Plaintiff Failed to Adduce Probative Facts to Show Any Causal Relationship Between the Violation of the Federal Safety Appliance Act and the Injury; Therefore, Since Reasonable Minds Could Not Reasonably Differ on the Question of Causation, the Decision of the Court of Appeals of Ohio Reversing the Judgment of the Court of Common Pleas of Ohio and Remanding to that Court for a New Trial, Properly Corrected the Prejudicial Error Committed by the Trial Court in Charging the Jury on the Applicability of the Federal Safety Appliance Act.

Despite the trend of recent Federal Employer's Liability Act decisions in this Court, it is still the law that the

recovery which is permitted under the act clearly is limited to those injuries which are *proximately caused, in whole or in part*, by the violation of the Federal Safety Appliance Act.

Davis v. *Wolfe*, 263 U. S. 239, 86 L. Ed. 284, 44 S. Ct. 64 (1923);
Dobson v. *Grand Trunk Western Railroad Co.*, 7th Cir., 248 F. (2d) 545, at 547 (1957);
Chesapeake and Ohio Railway Company v. *Burton*, 4th Cir., 217 F. (2d) 471 at 473 (1954);
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943);
Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943);
Texas & Pacific Ry. Co. v. *Thomson*, 5th Cir., 232 F. (2d) 313 (1956);
Fleming v. *Kellett*, 10th Cir., 167 F. (2d) 265 (1948);
Reynolds v. *Atlantic Coast Line R. Co.*, 5th Cir., 196 F. (2d) 643 (1952);
Cusson v. *Canadian Pac. Ry. Co.*, 2d Cir., 115 F. (2d) 430 (1940);
New York, New Haven & Hartford R.R. Co. v. *Leary*, 204 F. (2d) 461 (1953) (*Cert. denied* 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71);
Johnson v. *Chicago Great Western Ry. Co.*, 64 N. W. (2d) 372 (1954);

Viewing the evidence in the instant case most strongly in favor of the Petitioner, it is impossible to stretch the facts far enough to allow a reasonable person to find *any* direct causal relation between the breaking of the coupler and the Petitioner's injury. That this Court has gone far in liberally construing the Federal Employers' Liability Act is well known; yet, as shown by the above cited authorities, this Act is still predicated upon deep-rooted and settled principles of negligence law. Thus, the requirement that there be a direct proximate causal relationship between the negligence and the injury *is still* the law, albeit

that negligence need but "play any part, even the slightest, in producing the injury."

To find that there is an effective causal relation in the instant case, and to submit this to the jury, is to do utter violence to the oft-repeated phrase that the "railroad is not an insurer of the safety of its employees under the Federal Employers' Liability Act." Wherein did the breaking of the coupler directly contribute "in whole or in part" to the injuries of the Plaintiff? He suffered no injuries when the train came to a sudden stop. He suffered no injuries when he left the diesel engine and went forward to flag the southbound train. He suffered no injuries when he climbed into the southbound engine nor when he later alighted therefrom. He suffered no injuries when he climbed back into his own engine, nor *while he sat talking to the engineer for an addtional seven or eight minutes.* If the Plaintiff had somehow suffered an accident during any of this time, as he moved from one place to another, could this be said to have been the proximate result of the breaking of the coupler? During this protracted interval, a crew member of the *southbound train* threw off a replacement knuckle to assist in repairing the coupler. If this crew member had injured himself in so doing, are we to stretch the Act so far as to say that his injury would also be proximately caused by the breaking of the coupler?

If Plaintiff had been struck by a bolt of lightning while he sat talking to the engineer, would this too be proximately caused by the defective coupler?

We submit that the breaking of the coupler was *not* the proximate cause in whole or in part, of the subsequent injury of the Plaintiff. While, it is true that "*but for*" the breaking of the coupler, the situation would not have arisen which activated the Plaintiff to go into the nose compartment to secure the replacement knuckle, no case

has gone so far as to permit "*but for*" to constitute the touchstone of recovery.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943);
Reetz v. *Chicago & E. R. Co.*, 46 F. (2d) 50, 6th Cir. (1931);
Central of Georgia Ry. Co. v. *A. R. Clark*, 95 Ga. App. 325, 98 S. E. (2d) 85 (1957);
Johnson v. *Chicago Great Western Ry. Co.*, Minn. Sup. Ct. 64 N. W. (2d) 372 (1954);
Chesapeake & Ohio Ry. Co. v. *Burton*, 4th Cir., 217 F. (2d) 471 (1954).

In the *Brady* case, *supra*, the facts were:

Plaintiff's decedent, a brakeman, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit "the wrong end" of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. Plaintiff, among other theories, sought recovery based on the defective condition of the west rail opposite the derailer, permitting the car to rise over the "wrong end of the derailer." The jury returned a verdict for the Plaintiff for $20,000. *The Supreme Court of North Carolina reversed and the United States Supreme Court affirmed the reversal, holding there was insufficient evidence of proximate causation to justify submitting the case to the jury.*

At page 479 of the *Brady* decision, Mr. Justice Reed stated:

> "The weight of the evidence under the Employers' Liability Act *must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524, Cf. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284.

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States*, 319 U. S. 372; *Pence* v. *United States*, 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, n. 1; *Anderson* v. *Smith*, 266 U. S. 439; *Coughran* v. *Bigelow*, 164 U. S. 301, 307; *Gunning* v. *Cooley*, 281 U. S. 90, 93, note; *Seaboard* v. *Padgett*, 236 U. S. 668, 673; *Parks* v. *Ross*, 11 How. 362, 373. See IX Wigmore on Evidence, 3d ed., 1940, §§ 2494 et seq."

and at page 483:

> "Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. . . . *The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. . . . Bare possibility is not sufficient.* Milwaukee & *St. Paul Ry. Co.* v. *Kellog*, 94 U. S. 469, at 475:
>
> "'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' *Events too remote to require reasonable prevision need not be anticipated. . . . The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*" (Emphasis added.)

Petitioner argues in his Brief (page 16) that foreseeability has no place in the instant case and that the Court of Appeals of Ohio erred in basing its decision on lack of foreseeability. The cases show that foreseeability is the test, and that Petitioner's contention is erroneous.

See *Texas and Pacific Ry. Co.* v. *Thomson*, 232 F. (2d) 313, 5th Cir. (1956) wherein the *Brady* case is approved and followed.

Chesapeake and Ohio Ry. Co. v. *Thomas*, 198 F. (2d) 783, 4th Cir. (1952) *Certiorari denied*, 344 U. S. 921 (1953).

Fleming v. *Kellett*, 167 F. (2d) 265, 10th Cir. (1948), at page 267:

> "Question remains whether the negligence was 'in whole or in part' the cause of the injury. Otherwise stated, the negligent conduct of the Railroad must be a 'substantial factor' in bringing about the harm. Restatement Torts § 431."

Fore v. *Southern Ry. Co.*, 178 F. (2d) 349, 4th Cir. (1949).

Reynolds v. *Atlantic Coast Line R. Co.*, 5th Cir., 196 F. (2d) 643 (1952), (*Cert. denied* 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71) at 646:

> "Under the Federal Employers' Liability Act the basis of recovery is negligence, not mere injury, and the negligence must be the proximate cause of the injury. In order to find that negligence is the proximate cause of an injury 'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances.'"

New York, New Haven & Hartford R. Co. v. *Leary*, 204 F. (2d) 461, 1st Cir. (1953), at 466:

> "*Brady* v. *Southern Ry. Co.* (*supra*) is our guide and the issue before us is just what danger or risk is created by a defective air brake." (*Certiorari denied*, 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71.)

See also, Judge Learned Hand's discussion of foreseeability in Federal Employers' Liability Act cases in *Cusson* v. *Canadian Pac. Ry. Co.*, 2d Cir., 115 F. (2d) 430 at 432 (1940).

Petitioner seems not only to question the propriety of the Appellate Court's decision, but also the very *authority* of the Appellate Court *to review*. Despite the liberality with which the Federal Employers' Liabiltiy Act and Federal Safety Appliance Act are administered, State courts, nevertheless, have retained their inherent and statutory powers to review and if errors be found, it is their *duty* to correct the errors by means of reversal and remand. This proposition is aptly stated in *Chesapeake and Ohio Ry. Co.* v. *Thomas*, 4th Cir., 198 F. (2d) 783 (1952), at page 788:

> "We are all aware of the line of cases decided by the Supreme Court on the functions of the court and the jury under the F. E. L. A., and the proposition they establish that an appellate court must not take cases out of the jury's hands, or uphold such action, where any reasonable basis whatever for submission is revealed by the evidence (citing cases). *But this does not mean that such an appellate function is eliminated under the Act, or that reversal is not justified upon 'a complete absence of probative facts to support the conclusion reached.'* (*Lavender* v. *Kurn*, 327 U. S. 645, at 653; and other cases cited). *To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact.*" (Emphasis added.)

(This case was *denied certiorari*; see 344 U. S. 921, 1953.)

II. The Judgment of the Court of Appeals of Ohio Remanded This Cause to the Court of Common Pleas for a New Trial; Therefore, This Court Will Not Grant Certiorari to Review the Judgment of the Court of Appeals Because It Is a Non-Final Judgment.

From the adverse verdict in the trial court, Respondent appealed to the Court of Appeals of Ohio, which court ruled (Pet. App. A, p. 7a):

> "The judgment of the Court of Common Pleas is reversed and the cause is remanded to that court for a new trial and further proceedings according to law."

The Ohio Supreme Court having overruled Petitioner's Motion to Certify, the status of the case is such that (if the instant Writ is denied) a new trial must be held in the Trial Court. Thus, there is not here involved a "final judgment or decree" within the meaning and requirement of 28 U. S. C. § 1257, 62 Stat. 929.

American Construction Co. v. *Jacksonville, T. & K. Ry. Co.*, 148 U. S. 372, 384, 37 L. Ed. 486, 13 S. Ct. 758 (1892).

Gospel Army v. *City of Los Angeles, Calif.*, 331 U. S. 543, 91 L. Ed. 1662, 67 S. Ct. 1428 (1947);

Market St. Ry. Co. v. R.R. Comm. of Calif., 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770 (1945), rehearing denied 324 U. S. 890, 89 L. Ed. 1438, 65 S. Ct. 1020;

South Pac. Ry. Co. v. *Gileo*, 351 U. S. 493, 100 L. Ed. 1357, 76 S. Ct. 952 (1956).

III. The Decision of the Ohio Supreme Court Overruling Petitioner's Motion to Certify Was General and Presumably Was Based on an Arguable Non-Federal Ground in the Record. This Being True, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained.

The Supreme Court of Ohio does not assign reasons for allowance or disallowance of Motions to Certify. In this case, there is no explanation in the Court's entry overruling the Motion to Certify as to the ground on which the decision was based.

It may therefore be presumed that the Motion was overruled on the ground that no error had intervened by reason of the judgment of the Court of Appeals to reverse and remand for new trial and that the case was not one of "public or great general interest" under Ohio Constitution, Article V, Section 2.

Five of the six Assignments of Error filed by Respondent in the Court of Appeals (and therefore in the record before the Ohio Supreme Court in its consideration of the Motion to Certify) were undeniably non-federal questions. Any one of these could have been the basis of the Supreme Court's decision to overrule the Motion to Certify, hence refusing to alter the Court of Appeals' decision to remand for a new trial. It must be presumed that the decision overruling the Motion rested on non-federal ground(s) and is not reviewable by this Court.

Klinger v. *Missouri*, 13 Wall. 257 (1871);
Murdock v. *Memphis*, 20 Wall. 590 (1875);
Block v. *Block*, 350 U. S. 808, 100 L. Ed. 725, 76 S. Ct. 74 (1955).

IV. Should This Court Agree with Petitioners' Position on the Writ and Merits, Respondent Should Be Permitted to Present to the Supreme Court of Ohio the Five Non-Federal Assignments of Error Urged in the Ohio Court of Appeals, But Not Yet Urged in the Supreme Court of Ohio Because Respondent Was Precluded from So Doing By Ohio Statutes and Rules of Practice of the Ohio Supreme Court.

A brief review of the procedural chronology in this case shows that after the Court of Common Pleas entered judg-

ment on the verdict for Petitioner, Respondent appealed to the Ohio Court of Appeals listing six Assignments of Error (set forth on p. 5, this Brief). Five of these Assignments were non-federal questions; only Assignment No. 3 involving the federal issue.

The Court of Appeals, basing its decision on Assignment No. 3 reversed the decision of the Trial Court and remanded the cause for a new trial (Pet. App. A, p. 7a).

Petitioner then filed a Motion to Certify in the Supreme Court of Ohio alleging three Assignments of Error, all of which were based on the applicability of the Federal Safety Appliance Act, and the Court of Appeals' decision with reference to that Act.

Respondent did not file a cross-appeal to the Supreme Court of Ohio at that time because the Statutes of Ohio and Rules of Practice of the Supreme Court of Ohio (*infra*) did not require Respondent to do so. Hence, while technically part of the Record of the case, the five non-federal Assignments of Error urged by Respondent in the Court of Appeals were not argued to the Supreme Court of Ohio in its determination of the Petitioner's Motion to Certify, which was based solely on the single federal question forming the basis of the Court of Appeals' decision.

Ohio Revised Code § *2505.22* provides:

> "Assignments of error may be filed on behalf of an appellee *which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part.* The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court." (Emphasis added.)

Rule II, Section 2(B) of the Rules of Practice of the Supreme Court of Ohio, entitled "Appellee's Brief on Merits" provides:

> "It is . . . the duty of the appellee . . . to file . . . brief(s) . . . within Seventy Days after the docketing of the case in this Court. *Appellee may include in his brief his assignments of error, if any, as provided by Section 2505.22 of the Revised Code,* effective June 22, 1945. The Appellee's brief shall *include such reasons and authorities in support of his assignments of error* as he may desire as well as an answer to appellant's brief. . . ." (Emphasis added).

Should this Court determine that the Writ should issue and that the Court of Appeals of Ohio erred in reversing the decision of the Trial Court, it would, in effect be holding that the Supreme Court of Ohio likewise erred in overruling the Motion to Certify.

Had the Supreme Court of Ohio granted Petitioner's Motion to Certify, Respondent then would have had its opportunity to assign as errors the decision of the Court of Appeals that its five non-federal Assignments of Error were not well taken.

Since the Ohio Supreme Court overruled the Motion to Certify, Respondent could not file a brief on the Merits; and not until it had the opportunity to file its brief on the merits (See Rule II, Section 2B, Rules of Practice Supreme Court of Ohio, *supra*) could it assign the five non-federal errors and argue same with supporting authorities.

Ohio Revised Code § *2505.22* (*supra*) requires that *before a reviewing court reverses in whole or in part the judgment of a lower court,* the Appellee (Respondent in the Ohio Supreme Court) *must* be given an opportunity to file its assignments of error and the reviewing court must pass on these assignments.

See *Winslow* v. *The Ohio Bus Line Co.*, 148 Ohio St. 101 at 117; 73 N. E. (2d) 504 (1947);

In *Permanent Ins. Co.* v. *Cox*, 99 Ohio App. 389, 133 N. E. (2d) 627 (1955), in construing *R. C.* § *2505.22* the court holds at 99 Ohio App. 396:

"The reviewing court is required to pass on assignments of error filed by the appellee only when the judgment is reversed in whole or in part. This court, reversing the judgment of the trial court, is required to pass on appellee's assignments of error. Under R. C. § 2505.22 such assignments of error must be filed within the time fixed by rule of court . . . with which appellee has complied."

Since the Supreme Court of Ohio never permitted this cause to be heard on the merits, and since therefore Respondent has not yet been permitted to have reviewd by the Supreme Court of Ohio the adverse decision of the Court of Appeals as to Respondent's five non-federal, local questions of law, this Court, if it agrees with Petitioner on the merits, should permit Respondent to have "its day in court" by presenting for review before the Ohio Supreme Court the five non-federal issues. *This Court has repeatedly reversed and remanded to a lower court with instructions to consider those issues which the lower court, because of an erroneous determination of a dispositive federal question, felt it unnecessary to pass upon:*

Grant v. *A. B. Leach Co.*, 280 U. S. 351, 74 L. Ed. 470, 50 S. Ct. 107 (1929);
Lynerman v. *United States*, 303 U. S. 33, 82 L. Ed. 630, 58 S. Ct. 430 (1938);
Marconi Wireless Teleg. Co. v. *Simon*, 246 U. S. 46, 62 L. Ed. 568, 38 S. Ct. 275 (1918);
Fox v. *Gulf Refining Co.*, 295 U. S. 75, 79 L. Ed. 1311, 55 S. Ct. 641 (1935);
Indiana v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443 (1938);
Aetna Casualty & S. Co. v. *Flowers*, 330 U. S. 464, 91 L. Ed 1024, 67 S. Ct. 798 (1947);
Huddleston v. *Dwyer*, 322 U. S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015 (1944);

Bank of America Nat. Trust & Sav. Assn. v. *Parnell*, 352 U. S. 29, 1 L. Ed. (2d) 93, 77 S. Ct. 119 (1956); *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 73 S. Ct. 739, 97 L. Ed. 1125 (1953).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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